United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7107

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUG 16 1977

REYNOLDS SECURITIES, INC., Plaintiff- Appellee -v- RICHARD BERTOLI & LILRICH MINES, LTD., Defendants RICHARD BERTOLI Defendant-Appellee	CIVIL APPEAL DOCKET NO. 77-7107

REPLY BRIEF FOR APPELLANT RICHARD O. BERTOLI

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Dated: Sparkill, New York
August 9, 1977

UNITED STATES COURT OF APPEALS
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REYNOLDS SECURITIES, INC., Plaintiff-Appellee -v- RICHARD BERTOLI & LILRICH MINES, LTD., Defendants RICHARD BERTOLI Defendant-Appellee	CIVIL APPEAL DOCKET NO. 77-7107

REPLY BRIEF FOR APPELLANT RICHARD O. BERTOLI

The brief of appellee Reynolds Securities, Inc. (Reynolds) clearly shows that no cause of action arose against appellant Richard Bertoli under SEC Rule 10b-5 or 17(a) of the Securities Act of 1933 or Section 352-c of the General Business Law of the State of New York.

There has been no testimony or evidence introduced by Reynolds to show "scienter."

Further, Reynolds has relied upon the wrong rule of timely delivery in an attempt to prove their case. Lilrich was and is considered an unregistered dealer in securities and a receive versus payment (RVP), deliver versus payment (DVP), cash on delivery (COD) account. Indeed, even the Securities and Exchange Commission has ruled that Lilrich was and is a "dealer" in securities. As such, Lilrich had thirty (30) days to deliver said securities to Reynolds.

In fact, the history of the Lilrich account at Reynolds in trading substantial quantities of stock showed a normal history of late deliveries by Reynolds to Lilrich and Lilrich to Reynolds. Prior to IBM transactions, Reynolds never raised an issue as to late delivery.

Further, the account of Lilrich was solicited by Reynolds through its representative, Harrison. (Testimony of Robert Harrison).

The testimony of Harrison showed that Reynolds had full knowledge that Lilrich financial standing rested upon its ability to clear its transactions through Executive.

At the time of the sales of IBM and Chase Manhattan, Lilrich could not have known that Executive would fail prior to the delivery date.

It was the failure of Executive that caused Reynolds to buy-in the shares sold by Lilrich without notice and without chance for Lilrich to establish a new clearing agent.

The description of the type of business in which Lilrich was engaged as specified on the Reynolds new account form was altered by Harrison. (Testimony of Robert Harrison).

Neither Lilrich nor Bertoli sold or bought IBM stock or any stock from Reynolds. Reynolds was a stockbroker acting on behalf of its customer, Lilrich and for its account sold IBM and Chase stock to another.

The only claim that could be made was the failure of Lilrich to turn over to Reynolds the said stock for delivery to the purchaser or purchasers of said stock. As a customer, Lilrich is chargeable for the monies owed to Reynolds to acquire the said stock for the account of Lilrich and make delivery to the purchaser.

General Business Law 352-c applies only to deceit or fraud with respect to the quality of said stock.

There is not and cannot be any claim of any representation as to the quality of the stock bought for the account of Lilrich by Reynolds. See: Herdegen v. Paine, Weber, Jackson & Curtis, 220 NY S.2d 459 (attached). The Court stated: "The intention of that statute is to protect the general public against fraud in the sale of securities."

The United States District Court for the Southern District of New York ruled that Section 17(a) of the Securities Act does not provide for a private cause of action (p. 313) for any violation of that section. Architectural League of New York v. Bartos, 404 F. Supp. 304, 313. In that case, the Court also found that a 10b-5 action requires facts amounting to scienter, intent to defraud, reckless disregard for the truth, or knowing use of a device, scheme or artifice to defraud. Since Reynolds was a broker or agent of Lilrich, it did not buy the stock sold by Lilrich. Its position as a member of the Stock Exchange was its obligation to acquire on behalf of Lilrich and to charge to the account of Lilrich, the costs of the stock necessary to complete the sale made by Reynolds for the account of Lilrich of the stock. The only charge against Lilrich is the amount of money laid out by Reynolds on its behalf when Lilrich did not deliver through Reynolds to the buyer of said stock, which was a person other than Reynolds. It should be noted that Reynolds bought-in said shares without notice to Lilrich and in a panic as a result of the failure of Executive.

Also, the finding by Court of no liability on Bertoli's promissory note, constitutes a bar to any responsibiliyy of Bertoli to Lilrich's failure to deliver the securities which is basis of present action.

Appellee in total disregard for the law uses as the primary basis for the contention that fraud existed, information concerning an administrative proceeding and an indictment.

All information concerning the administrative proceeding was properly excluded by the trial judge and no reference to an indictment was raised at the trial. Indeed, the administrative proceeding has not been determined by the Commission as of this date. Both references should be excluded in determining this appeal.

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(914) 359 5729

Dated: Sparkill, New York
August 9, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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REYNOLDS SECURITIES, INC.,

Plaintiff-Appellee

-v-

RICHARD BERTOLI & LILRICH MINES, LTD.,

Defendants

RICHARD BERTOLI,

Defendant-Appellant

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ATTESTATION OF SERVICE

I, BURT HYMAN, declare under penalty of perjury that I have served a copy of the attached REPLY BRIEF FOR APPELLANT RICHARD O. BERTOLI, upon Lunney & Crocco, 20 Exchange Place, New York, New York, by mailing it on August 9, 1977, from the mailbox at Rutherford, New Jersey at 5:00 P.M.

Burt Hyman

BURT HYMAN

21 Ridge Boulevard
Port Chester, New York

Sworn and subscribed to before me
this 9th day of August, 1977.

Annette Barone

ANNETTE BARONE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 11